(6)

No. 90-1124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KEITH JACOBSON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEBRASKA CIVIL LIBERTIES UNION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The Nebraska Civil Liberties Union is one of its statewide affiliates. This case raises fundamental questions about the constitutional limits on the state's power to investigate its citizens. Its proper resolution, therefore, is a matter of direct organizational concern to the ACLU.

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. The NACDL was founded over twenty-five years ago to promote, study and advance the knowledge of criminal defense law, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is to promote the proper administration of criminal justice. Consequently, the NACDL is concerned with protecting individual rights and with improving criminal law, its practices and procedures. In furtherance of that organizational objective, NACDL strives to ensure that the government's conduct of undercover "sting" operations does not employ methods that violate the Due Process Clause, or that constitute entrapment as a matter of law.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Keith Jacobson is a 57 year old resident of Newman Grove, Nebraska, who lives on a farm, supports his elderly parents, was a war hero, and had prior to this case an unblemished record save for a driving offense over thirty years ago. He was targeted by the government for an undercover "sting" operation because his name was discovered on a bookstore's mailing list as having purchased two nudist magazines -- the receipt of which did not violate any law -- and a brochure listing stores selling sexually explicit material. Although the government had no information that Jacobson had ever ordered or advertised for any child pornography, had ever purchased child pornography or produced child pornography, or was likely to engage in the receipt or distribution of child pornography, the government launched a two and one-half year operation involving twelve solicitations from five separate government-created entities in order to entice Jacobson to purchase a magazine depicting child pornography, which he eventually did, and for which he was prosecuted and convicted.

A panel of the Eighth Circuit reversed his conviction with one judge dissenting, holding that Jacobson was entrapped as a matter of law. *United States v. Jacobson*, 893 F.2d 999 (8th Cir. 1990). The majority concluded that before launching an undercover "sting" operation aimed at a specific individual, the government must have a reasonable suspicion based on articulable facts that the target had committed a similar crime in the past or was likely to commit such a crime in the future. Otherwise, "government agents [could] target entire groups of people without specific justification, hoping to uncover some individual who is predisposed to commit crime if given enough opportunities to do so." *Id.* at 1001. Thus, the panel concluded, any evidence that Jacobson was predisposed to engage in criminal activity was tainted by the illegal targeting.

Upon rehearing *en banc*, the court of appeals vacated the panel's decision and affirmed the conviction. *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990). The court, with Chief Judge Lay and Judge Heaney dissenting, held that Jacobson had no constitutional right to be free of investigation, and that there is no requirement that the government have a reasonable suspicion based on articulable facts before targeting an individual with an undercover "sting" operation. The court further held that the government merely presented Jacobson with opportunities to purchase child pornography, and the question of his predisposition was properly left to the jury.

This Court granted *certiorari*, limited to the question of whether a defendant has been entrapped as a matter of law when the government, having failed in several attempts to entice him to engage in illegal activity over a two year period, and in violation of their own guidelines for the conduct of undercover operations, finally induces the defendant to receive child pornography through the mails.

SUMMARY OF ARGUMENT

Undercover "sting" operations can be a useful law enforcement tool. They are also easily prone to abuse. It is important, therefore, for this Court to hold that such operations cannot be commenced absent some indication that the targeted individual is likely to engage in illegal activity. This minimal restraint is implicit in the notion of fundamental fairness embodied in the Due Process Clause. It also flows directly from what Justice Brandeis described as the "right to be let alone."

The government argues that its investigatory powers are unrestricted by any requirement of particularized suspicion. However, the FBI's own internal guidelines carefully provide that undercover operations may not be undertaken absent a "reasonable indication" that the tar-

geted individual has engaged, is engaged, or is likely to engage in similar illegal activity. Alternatively, the guidelines state that the undercover operation must be "structured" to insure that it will only attract persons otherwise predisposed to engage in the illegal activity under investigation.

In making this determination, the government may not rely on constitutionally protected activity to launch an undercover operation. Thus, conduct that is protected by the First Amendment, such as the right to read, to observe, and to fantasize, may not be used as the basis for interfering with an individual's liberty and autonomy.

The record in this case leaves little doubt that petitioner was entrapped as a matter of law into purchasing child pornography. Absent any basis to suspect that he was likely to engage in illegal activity, the government targeted him in twelve separate mail solicitations emanating from five different fictitious government-created entities, over a two and one-half year period, to induce him to engage in activity that was entirely legal when the government commenced its operation and only became subject to criminal sanctions during the course of the prolonged undercover operation.

There is every reason to believe, as the dissent below observed, that petitioner was enticed by the government's persistence into illegal activity that he had never committed before, and would not have committed this time, had the government merely left him alone. Such patent overreaching cannot be reconciled with the Due Process Clause.

ARGUMENT

I. DUE PROCESS PROHIBITS THE USE OF UNDERCOVER "STING" OPERATIONS ABSENT SOME REASON TO BELIEVE THAT THE TARGETED INDIVIDUAL IS OTHERWISE LIKELY TO ENGAGE IN ILLEGAL ACTIVITY

The concept of due process acts as a constitutional check on the the government's power to investigate and prosecute individuals suspected of illegal activity by invoking "[t]he awful instruments of the criminal law," *McNabb v. United States*, 318 U.S. 332, 343 (1943). Thus, government conduct that is brutalizing, *Rochin v. California*, 342 U.S. 165, 172 (1952); entrapping, *Raley v. Ohio*, 360 U.S. 423, 437-39 (1959); discriminatory, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); or standardless, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), violates due process.

So far, this Court has not elaborated on the scope of due process protection available to targets of undercover operations. However, on several occasions the Court has suggested, albeit in *dicta*, that the government's use of artifice as an investigative tool is properly subject to due process limitations. *See, e.g., United States v. Russell*, 411 U.S. 423, 431-32 (1973)("[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."); *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring)(suggesting that due process might be violated where "[p]olice overinvolvement in crime . . . reach[es] a demonstrable level of outrageousness"). *See also Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

These expressions reflect two complementary concerns: one is the fear of prosecutorial overreaching; the

other is our nation's abiding belief in the presumptive right of every individual to lead his or her life free of government harassment. *Amici* do not suggest that law enforcement personnel may not target an individual for an undercover operation absent the probable cause that would be required under the Fourth Amendment for an arrest. *See Draper v. United States*, 358 U.S. 307 (1959). However, some factual predicate is surely necessary as a safeguard against the government's arbitrary use of law enforcement power in the investigative context. *See United States v. Twigg*, 588 F.2d 373, 381 n.9 (3d Cir. 1973)(lack of factual justification for soliciting persons with no apparent criminal intent an important factor in finding due process violation).

The government itself has recognized the need for an individualized factual predicate before launching an undercover operation that encourages persons to engage in illegal activity. Indeed, the government has imposed a requirement of reasonableness before selecting targets for such operations. The Department of Justice has promulgated comprehensive guidelines "to establish clear and workable procedures for the authorization and review of undercover operations at appropriate levels in both the FBI and the Justice Department." Department of Justice, Office of the Attorney General, "Attorney General's Guidelines on FBI Undercover Operations" 1 (Press Release Jan. 5, 1981).[2] The Guidelines provide that no undercover operation offering inducements to illegal activities is to be approved unless:

> (a) There is a *reasonable indication*, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or
>
> (b) The opportunity for illegal activity has been structured so that there is *reason for believing* that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

Department of Justice, Office of the Attorney General, "Attorney General's Guidelines on FBI Undercover Operations" 16 (Dec. 31, 1980), *reprinted in Law Enforcement Undercover Activities: Hearing before the Select Comm. to Study Law Enforcement Undercover Activities of Components of the Dep't of Justice*, U.S. Senate, 97th Cong., 2d Sess. 86, 101 (1982)(emphasis added)(hereafter *Senate Hearings*).

Elaborating on the need for a reasoned basis before targeting individuals or organizations, the Department's Guidelines further state:

> A key principle underlying these practices, and reflected in these Guidelines, is that individuals and organizations should be free from law enforcement scrutiny that is undertaken without a valid factual predicate and without a valid law enforcement purpose.

Department of Justice, Office of the Attorney General, "Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations" 1 (Dec. 2, 1980), *reprinted in Senate Hearings*, at 121.[3] Further, consistent

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[2] The Guidelines purport to be "significantly more restrictive than those required by the law of entrapment or the constitutional principles of due process." *Id.* The government's own evaluation of the scope of due process protection in the investigative context is obviously self-serving and of no legal significance.

[3] Moreover, Guidelines established by the United States Postal Inspection Service requires that undercover "sting" operations be directed only at those persons whose names appeared independently on at least two lists acquired from the following sources: mailing lists seized by postal inspectors in separate child pornography investiga- (continued...)

with its reasonableness requirement, the Guidelines also limit the duration of an undercover operation initially to six months. *Senate Hearings* at 120.

The principle embodied in the Guidelines as well as in the Due Process Clause -- that the government target only those persons who have shown a willingness to engage in crime, are currently engaged in crime, or are about to commit a crime -- is not a novel concept. It "derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile persons into lapses which they might otherwise resist. Such an emotion is out of place, if they are already embarked on conduct morally indistinguishable and of the same kind." *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933)(L. Hand, J.).

There is little doubt that the government has ample ability to generate crime by inducing individuals selected at random to violate the law. But it should be equally clear that the Constitution does not permit integrity tests of randomly selected citizens -- whether chosen from mailing lists, voter registration lists, or even telephone directories. *See* Gershman, "Abscam, The Judiciary and the Ethics of Entrapment," 91 Yale L.J. 1565 (1982). Such random solicitation without individualized suspicion

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[3] (...continued)
tions; incoming child pornography seized by the United States Customs Service; programs conducted by the FBI; investigations of mail order dealers of child pornography conducted by metropolitan police departments and state police agencies; or Postal Inspection Service regional testing programs. Trial transcript at 95, 97, 146-47. In the instant case, petitioner's name appeared on only one mailing list. His name was not on a mailing list involving incoming child pornography seized by the United States Customs Service. His name was not obtained from any program conducted by the FBI. His name was not on any list acquired from child pornography dealers during investigations conducted by metropolitan police or state police agencies. His name was not acquired from the Postal Inspection Service during regional testing programs.

does not implicate merely a prosecutorial policy judgment about effective crime control to which the judiciary should defer. *See United States v. Russell*, 411 U.S. at 435 ("The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations"). Such conduct is a gross violation of the "right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).

Indeed, such unjustified intrusions, undertaken without the safeguards of a warrant, *cf. Katz v. United States*, 389 U.S. 347 (1967)(requiring a warrant for electronic eavesdropping), not only violate an individual's privacy and autonomy, but can become a tool of political oppression. *United States v. Jannotti*, 673 F.2d 578, 612-13 (3d Cir.)(Aldisert, J., dissenting). Nor is the government's conduct constitutionally validated because it may succeed in inspiring some persons to engage in illegal activity. Due process is offended because the investigative methods for which immunity is claimed create an unreasonably high risk that innocent persons will be victimized.[4] In this case, petitioner was solicited twelve separate times by five separate government-created entities over a two and one-half year period before he finally succumbed, and purchased a magazine.

In short, the government's conduct in pursuing petitioner in this relentless fashion is offensive to notions of fundamental fairness. The net result of its investigatory tactics is that the government has used its scarce re-

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[4] *See United States v. Myers*, 527 F.Supp. 1206, 1225 (E.D.N.Y. 1981)(noting that three legislators brought to federal agents during the "Abscam" investigation rejected the bribe offers), *aff'd*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 U.S. (1983).

sources to produce an unwitting, government-fashioned criminal who would probably have continued to mind his own business as a law-abiding citizen had the government simply left him alone. *See United States v. Kaminski*, 703 F.2d 1004, 1010 (7th Cir. 1983)(Posner, J., concurring)("If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime").

As Judge Heaney observed in his dissent below:

> [A]ll the time, effort, expense, and ingenuity invested in apprehending Jacobson yielded only a single conviction of a single individual for the receipt of a single magazine that would never have entered the United States mails had the Postal Service not deposited it there in the first place. The investigation of Jacobson produced no new evidence against existing pornography producers or purchasers and did nothing to further the goal of preventing the sexual exploitation of minors.

916 F.2d at 476. In short, the government has violated its own rules, pushed beyond the outer limits established by due process, and now asks this Court to invoke principles of judicial deference that would immunize its behavior from any meaningful constitutional review.

Concededly, "criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." *Sherman v. United States*, 356 U.S. at 372. *See United States v. Russell*, 411 U.S. at 432; *Hampton v. United States*, 425 U.S. at 495-96 n.7 (Powell, J., concurring). Certain crimes, such as contraband offenses and official corruption, could not be investigated effectively without the use of undercover methods of infiltration and deceit. But a distinction should be drawn, as the government's Guidelines do, between an undercover operation that is carefully structured to provide an opportunity only for those persons already bent on illicit behavior to be drawn into criminal activity and those undercover operations, like the one at issue in this case, that are not so carefully structured. *Compare United States v. Gamble*, 737 F.2d 853 (10th Cir. 1984); *United States v. Thoma*, 726 F.2d 1191 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984); *United States v. Jannotti*, 673 F.2d 578 (3d Cir.)(*en banc*), *cert. denied*, 457 U.S. 1106 (1982); with *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985); *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984); *United States v. Twigg*, 588 F.2d 373.

The spectre of an undercover operation that actively and persistently targets persons who are suspected of no illegal activity runs afoul of the government's own Guidelines and constitutes an abuse of power. *Sherman v. United States*, 356 U.S. 369; *Sorrells v. United States*, 287 U.S. 435. This is especially true in the context of anti-pornography operations, where the government's use of psychological manipulation through "mirroring," and feigned intimacy from imposter "pen pals," incites and legitimizes an interest in child erotica that may not have previously existed, or that may have existed but would have laid dormant without the government's active interference.

Requiring a reasoned basis before the government may underake a "sting" operation against a targeted individual would not "introduce[ ] an unmanageably subjective standard," *United States v. Russell*, 411 U.S. at 435, into the conduct of investigations or into the judiciary's decisionmaking process. Indeed, under the Guidelines, the government itself has promulgated a reasona-

bleness standard for the conduct of undercover operations. Moreover, in contrast to a less clearly defined "outrageous" standard, *see id.* at 431, a reasonableness standard is quite familiar to courts reviewing issues under the Fourth Amendment. There is no reason to think that such a requirement as a matter of due process in the investigative context would undermine law enforcement or make judicial review more problematic.

To be sure, in the absence of any pronouncement by this Court, some federal courts of appeals that have considered the issue have rejected a "reasoned basis" or individualized suspicion requirement under the Due Process Clause.[5] But no court has held or would hold that there are *no* limits on government's power to initiate investigations. Thus, the rejection of a "reasoned basis" standard merely begs the question as to the appropriate methods that law enforcement may use in the conduct of investigations. Moreover, as noted above, these decisions are inconsistent with the federal government's own Guidelines for the conduct of undercover operations and with the notions of fundamental fairness embodied in the Due Process Clause.

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[5] *See, e.g., United States v. Chin*, No. 90-1503 (2d Cir. May 2, 1991) (rejecting "individualized suspicion" requirement on law enforcement officials in context of undercover investigation of violations of child pornography statutes); *United States v. Luttrell*, 923 F.2d 764, 764 (9th Cir. 1991)(*en banc*)(rejecting "reasoned grounds" requirement for investigation of counterfeit credit card transactions); *United States v. Jenrette*, 744 F.2d 817, 824 n.13 (D.C.Cir. 1984)(rejecting reasonable suspicion requirement in context of undercover investigations of public officials), *cert. denied*, 471 U.S. 1099 (1985); *United States v. Gamble*, 737 F.2d at 860 (rejecting "reasonable suspicion" requirement in context of undercover investigation of insurance fraud). Absent any guidance from this Court, the federal circuits have concluded, as did the court below, that a person "has no constitutional right to be free of investigation." 916 F.2d at 469; *United States v. Trayer*, 898 F.2d 805, 808 (D.C.Cir.), *cert. denied*, 111 S.Ct. 113 (1990).

II. ACTIVITY PROTECTED BY THE FIRST AMENDMENT MAY NOT PROVIDE INDIVIDUALIZED SUSPICION TO TARGET A PERSON FOR AN UNDERCOVER "STING" OPERATION

The government commenced its undercover investigation of petitioner following its seizure of a bookstore's mailing list showing that petitioner had ordered two nudist magazines and a brochure listing stores selling sexually explicit material. There is no claim that receipt of this material violated any penal statute. Predicating an undercover operation solely upon activity that is protected by the First Amendment infringes upon the constitutional right to read, to observe what one pleases, and to maintain one's own inner life without interference by the government.

A person's right to receive information and ideas, to read what one pleases, and to be free from governmental intrusions into the privacy of one's thoughts is protected by the First Amendment and the Due Process Clause. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). Writing for the Court in *Stanley*, Justice Marshall said:

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases -- the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for

> such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. at 565.

In *Stanley*, the material was obscene under a valid Georgia statute; in the instant case, the material did not violate any statute. Moreover, the government had no reason to suspect that petitioner had ever or would ever violate the law. Thus, the government launched its two and one-half year undercover campaign based solely upon petitioner's receipt of nonpornographic material. By so doing, the government deliberately exploited petitioner's right to personal liberty to think, to feel, and even to fantasize, *see Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 67 (1973)("The fantasies of a drug addict are his own, and beyond the reach of the state"), in order to determine whether he would be susceptible to undercover stimuli, and then repeatedly to encourage him to violate the law.[6]

[6] This case is easily distinguishable from *Osborne v. Ohio*, ___ U.S. ___, 110 S.Ct. 1691 (1990). In *Osborne*, the defendant was convicted for the private possession of child pornography that was unprotected by the First Amendment. Here, the government insists on its right to launch an undercover "sting" operation based solely on petitioner's private possession of erotic material that even the government concedes is entitled to constitutional protection.

Given the constitutional right to distribute reading material through the mail, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and the correlative constitutional right to receive it and read it, *Stanley v. Georgia*, 394 U.S. 557, it is impermissible for the government to utilize the fact that an individual possesses constitutionally protected material or engages in constitutionally protected activity as the basis for criminal investigation and ultimate punishment. *Raley v. Ohio*, 360 U.S. at 438-39 (conviction for refusing to answer question after government assurances that person had privilege to refuse to answer violates due process); *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965)(convicting person for illegally demonstrating after government assurances that demonstration was lawful violates due process). In sum, the government should not be allowed to turn the constitutional right to read into a tool of oppression. Such a result would follow if the government were allowed to use the fact of petitioner's name on a mailing list for constitutionally protected materials as the basis for launching an undercover investigation against him.[7]

[7] This Court need not decide whether constitutionally protected conduct can ever be considered in the decision to launch a government investigation. It is sufficient to hold on the facts of this case that an intrusive, undercover "sting" operation should not be undertaken *solely* on the basis of First Amendment activity.

III. PETITIONER WAS ENTRAPPED AS A MATTER OF LAW WHEN THE GOVERNMENT, WITHOUT INDIVIDUALIZED SUSPICION THAT HE WAS LIKELY TO ENGAGE IN ILLEGAL ACTIVITY, TARGETED HIM WITH TWELVE SEPARATE MAIL SOLICITATIONS FROM FIVE SEPARATE GOVERNMENT-CREATED ENTITIES OVER A PERIOD OF TWO AND ONE-HALF YEARS, TO INDUCE HIM TO PURCHASE A GOVERNMENT-MANUFACTURED PORNOGRAPHIC MAGAZINE

The evidence below established entrapment as a matter of law.[8] The government's numerous and persistent inducements and solicitations of petitioner over a two and one-half year period, without any reasoned basis to believe that he was predisposed to engage in illegal activity, finally succeeded in "implant(ing) the criminal design in (petitioner's) mind," *United States v. Russell*, 411 U.S. at 436; *Sorrells v. United States*, 287 U.S. at 442, and rendered his crime "the product of the creative activity of law enforcement officials." *Sherman v. United States*, 356 U.S. at 373. *See Casey v. United States*, 276 U.S. 413, 423 (1928)("The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature") (Brandeis, J., dissenting).

To begin with, at the time the government launched the first of its five undercover "sting" operations against him, petitioner was a law-abiding citizen who was not suspected of having committed any crime, particularly a violation of 18 U.S.C. §2252(a)(2)(knowingly receiving a visual depiction of a minor engaged in sexually explicit

[8] The government has attempted to characterize the issue in this case in terms of "outrageous" government conduct rather than entrapment. In *amici*'s view, the result is the same no matter which label is applied.

conduct).[9] There is no claim that the government was seeking to investigate preexisting criminal activity. *Compare United States v. Russell*, 411 U.S. 423 (drug laboratory); *Hampton v. United States*, 425 U.S. 484 (drug trafficking), with *Sherman v. United States*, 356 U.S. 369 (entrapment as a matter of law where government induced previously law-abiding person to obtain drugs); *Sorrells v. United States*, 287 U.S. 435 (entrapment defense should have been charged where government agent induced previously law-abiding citizen to obtain illicit liquor). There is no claim that petitioner was in the pornography trade, or that the government suspected that he was in the pornography trade. *See United States v. Thoma*, 726 F.2d 1191 (government informed that defendant involved in producing pedophilia). Nor is there any claim that petitioner was producing child pornography. *See United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)(government informed that defendant producing child pornography). The government knew only that petitioner had ordered two magazines depicting nude adolescent males, that did not involve sexually explicit or provocative conduct, and a brochure listing bookstores that sold similar material. The undercover targeting of petitioner violated not only the FBI's Guidelines for the conduct of undercover operations, but also the Guidelines established by the United States Postal Inspection Service for the conduct of undercover "sting" operations. Trial transcript at 346.

Over the next two and one-half years,[10] the govern-

[9] Indeed, the criminal statute for which petitioner was ultimately convicted had not even been enacted when the undercover operations were begun.

[10] It should be noted that the FBI Guidelines attempt to minimize the possibility of overly persistent solicitations by limiting the duration of an undercover operation initially to six months. See *Senate Hearings* at 120.

ment, through the Postal Service, targeted petitioner with twelve separate mail solicitations sent under the auspices of five separate fictitious organizations in order to induce petitioner to purchase a sexually explicit magazine, which he eventually did. In the course of its campaign to entice petitioner, the government engaged in psychological manipulation through a technique known as "mirroring," involving solicitations and correspondence with an imposter "pen pal," in order to stimulate petitioner's interest in erotic material. Government exhibits 11-14; trial transcript at 342. Petitioner occasionally evinced interest in the government's blandishments, but also demonstrated reluctance. He never ordered any material advertized by the fictitious "American Hedonist Society." He did not answer the sexual questionnaire from the fictitious "Midlands Data Research" organization. He did not respond to a letter from the fictitious "Heartlands Institute for a New Tomorrow." Nor did he correspond with any individuals who were referred to him as having "backgrounds and interests similar to yours." After petitioner ceased corresponding with "Carl Long," an undercover agent posing as a "pen pal," the Postal Service, this time using the fifth fictitious entity, "Far Eastern Trading Company, Ltd.," finally succeeded -- after two more solicitations -- in inducing petitioner to order two sexually explicit magazines, for which he was arrested.

Courts determining a defendant's predisposition principally examine the extent to which the government has endeavored to instigate the crime, as well as the defendant's background, in order to see "where he sits on the continuum between the naive first offender and the streetwise habitue." *United States v. Townsend*, 555 F.2d 152, 155 n.3 (7th Cir.), *cert. denied*, 434 U.S. 897 (1977). Courts that have found entrapment as a matter of law have concluded that the defendant was not merely given an opportunity to violate the law, but rather, as here, was encouraged to do so by repeated solicitations

after a failure to readily respond. *See United States v. Sherman*, 200 F.2d 880 (1952)(entrapment as matter of law where defendant did not readily respond to government's initial solicitation but did so only after further solicitation); *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985)(entrapment as matter of law where government repeatedly engaged in direct and indirect solicitations over two year period); *United States v. Lard*, 734 F.2d 1290 (entrapment as matter of law where defendant initially resisted government's solicitation).

The defendant's character and reputation are also important factors in determining predisposition. *United States v. Thoma*, 726 F.2d at 1197; *United States v. Dion*, 762 F.2d at 686, 688. The petitioner had an unblemished reputation, a commendable war record, and lived a quiet life on a farm in Nebraska. As Judge Heaney observed:

> Had the Postal Service left Jacobson alone, he would have, on the basis of his past life, continued to be a law-abiding man, caring for his parents, farming his land, and minding his own business. Now he stands disgraced in his home and his community with no visible gain to the Postal Service in the important fight against the sexual exploitation of children.

916 F.2d at 471 (dissenting opinion).

CONCLUSION

For the above reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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